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July 2009 Vol. 101 productsliability@joneswalker.com

IN THIS ISSUE:

CHINESE DRYWALL CASES ARE TRANSFERRED TO EASTERN DISTRICT FOR PRE-TRIAL PROCEEDINGS

***In re Chinese-Manufactured Drywall Products Liability Litigation*, MDL 2047, 2009 WL 1725973 (J.P.M.L. June 15, 2009)**

Cases from Florida, Ohio, and Louisiana involving Chinese-manufactured drywall have been transferred to the docket of Judge Eldon E. Fallon of the Eastern District of Louisiana for consolidated pre-trial proceedings. Plaintiffs in these cases allege that the drywall, imported from Chinese manufacturers, emits smelly, corrosive gases. The United States Judicial Panel on Multidistrict Litigation cited Judge Fallon's "extensive experience in multidistrict litigation as well as the ability and temperament to steer this complex litigation on a steady and expeditious course" as the reason for its selection. Judge Fallon has previously handled multidistrict litigation involving the drugs Propulsid and Vioxx.

—*Madeleine Fischer*

PRE-1975 MESOTHELIOMA NOT BARRED BY WORKERS' COMP; HIGH COURT RESOLVES CIRCUIT SPLIT

***Rando v. Anco Insulations Inc.*, Nos. 2008-C-1163 and 2008-C-1169 (La. 5/22/09), 2009 WL 1426272.**

This decision from the Supreme Court of Louisiana expands the availability of tort and products liability remedies for mesothelioma cases subject to the workers' compensation laws in effect prior to 1975. Ray Rando filed suit in the

JONES WALKER

e*bulletin

PRODUCTS LIABILITY

July 2009 Vol. 101 productsliability@joneswalker.com

Louisiana 19th Judicial District Court against three of his former employers for damages related to mesothelioma caused by alleged onlooker asbestos exposure as a pipe fitter from 1970–1972.

The defendant employers filed summary judgment based on their argument that the workers' compensation law precluded Rando's tort claims. The 19th JDC denied summary judgment. Following *Austin v. Abney Mills, Inc.*, 01-1598 (La.9/4/02), 824 So.2d 1137, the trial court applied the 1952 version of the workers' compensation law (La. Rev. Stat. § 23:1031.1 in effect during Rando's "significant exposure" to asbestos in the early 1970s) and found that mesothelioma was not a "covered disease" under the pre-1975 law, so that defendants were not entitled to the workers' compensation tort immunity for disease that accrued before 1975. The Louisiana First Circuit Court of Appeals affirmed.

The Supreme Court affirmed both lower decisions, ruling that pre-1975 mesothelioma tort claims against employers or former employers are not barred by the applicable workers' compensation law and resolved a split in the appellate circuits on the issue of whether mesothelioma was a compensable occupational disease under the pre-1975 version of the workers' compensation law and thus subject to the exclusivity provision of the pre-1975 version of La. Rev. Stat. § 23:1031.1. The Second and Fifth Circuit Courts of Appeal had held that mesothelioma was a compensable occupational disease under the act, barring tort claims based on that disease that accrued before 1975. See *Adams v. Asbestos Corp.*, 39,952 (La. App. 2 Cir. 10/28/05), 914 So.2d 1177; *Brunet v. Avondale Indus., Inc.*, 99-1354 (La. App. 5 Cir. 12/5/00), 772 So.2d 974, *writ not considered*, 01-0171 (La. 3/23/01), 787 So.2d 1006. The First and Fourth Circuit Courts of Appeal had held just the opposite—that mesothelioma was not a compensable occupational disease under the pre-1975 workers' compensation law and that workers suffering from mesothelioma may pursue tort claims against their employers for pre-1975 exposures. See *Terrance v. Dow Chemical Co.*, 06-2234 (La. App. 1 Cir. 9/14/07), 971 So.2d 1058, *writ denied*, 07-2042 (La. 12/14/07), 970 So.2d 534; *Gauthreaux v. Rheem Mfg. Co.*, 96-2193 (La. App. 4 Cir. 12/27/96), 690 So.2d 39, *writ denied*, 97-0222 (La. 3/14/97), 694 So.2d 977. After extensive analysis, The Supreme Court agreed with the First and Fourth Circuits and ruled that Rando's tort claims against his former employers were not barred by the workers' compensation exclusivity provision in effect before 1975.

The *Rando* decision is significant because it resolves a split in the Louisiana appellate courts and confirms that tort remedies are available against employers for mesothelioma claims accruing before 1975. The decision also may result in decreased forum shopping for pre-1975 mesothelioma cases.

—*Judith V. Windhorst*

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PRODUCTS LIABILITY

July 2009 Vol. 101 productsliability@joneswalker.com

DESIGNER OF A COMPONENT OF A TMJ IMPLANT NOT LIABLE UNDER PRE-LPLA LAW

***Adelmann-Chester v. Kent,* No. 2008-0770, 2009 WL 1146612 (La. App. 4 Cir. June 5, 2009)**

In 1988, Patricia Adelmann-Chester was one of 675 plaintiffs who sued Vitek, the manufacturer and distributor of dental implant devices, for damages they alleged sustained by using a medical device as a remedy for temporal mandibular joint ("TMJ") disorder. The plaintiffs suffered severe bone deterioration, bone spur development, and intense TMJ pain due to the breakdown of the Teflon coating applied to the Proplast implant. In addition to Vitek, the plaintiffs also sued the designers of the implant, as well as John Kent, D.D.S., the chair of the Oral and Maxillofacial Surgery Department at Louisiana State University ("LSU"), and the LSU School of Dentistry. During his tenure as a professor and Department Head at LSU, Dr. Kent acted a scientific advisor for Vitek.

Adelmann-Chester and her co-plaintiffs filed their products liability suit in Louisiana state court, alleging design defects and failure to adequately warn of risks of harm. However, by 1990, Vitek was bankrupt and the designers of the implants had fled the country, causing plaintiffs to refocus their efforts on recovering from the remaining defendants, Dr. Kent and LSU. The plaintiffs alleged that Dr. Kent and LSU were instrumental in efforts to design, manufacture, and market the Proplast implants dating back to 1978, and were liable under both general negligence and strict liability theories of recovery.

The undisputed facts showed that during his tenure as a professor and Department Head at LSU, Dr. Kent was a scientific advisor for Vitek. In this capacity, he drafted package inserts for some Vitek medical devices, and was on the team that designed the shape of a component of the dental implants at issue. Dr. Kent held several design patents on this component, and received a small royalty from the sale of certain Vitek products. He was also a shareholder in Vitek, but his stake in the company was less than one percent. The evidence further established that neither he nor LSU participated in, or had any control over, the final design, fabrication, construction, or marketing of the implants to TMJ disorder patients.

The plaintiffs attempted to present 225 documents that they believed showed that Dr. Kent provided significant and ongoing input into the design of the implants, that he drafted the package inserts, and that he provided Vitek with specific instructions regarding the design of the device when problems began to occur in the early 1980s. They claimed these documents overwhelmingly proved that Dr. Kent and LSU actively recommended the use of the implant despite their knowledge of the dangers presented by wear on the implant's Teflon surface as early as 1982.

However, the court completely disregarded the plaintiffs' 225 documents because the documents were unverified and unauthenticated. Plaintiffs purported to authenticate the documents by a single affidavit executed by an employee of plaintiffs' attorney attesting to being present when they received the documents. The court found this affidavit to be woefully insufficient to establish the authenticity of the evidence. Without these documents, plaintiffs had no evidence to support their allegations of negligence, and the negligence claims against Dr. Kent and LSU were properly dismissed.

JONES WALKER

e*bulletin

PRODUCTS LIABILITY

July 2009 Vol. 101 productsliability@joneswalker.com

The court further held that the Louisiana Products Liability Act ("LPLA") was inapplicable to plaintiffs' claims, which arose before the September 1988 enactment of the LPLA. Because the LPLA altered substantive legal rights, it could not be applied retroactively under Louisiana law. Therefore, the applicable law was negligence and/or Louisiana's pre-LPLA product liability law.

Pre-LPLA products liability law in Louisiana was based on certain Civil Code articles imposing strict liability upon a defendant who had custody or control of the thing that caused the injury. Neither Dr. Kent nor LSU had custody or any control over the manufacturing process and thus could not be held personally liable under a pre-LPLA products liability theory of recovery.

Similarly, because Dr. Kent and LSU were neither manufacturers nor vendors of the Proplast implants, plaintiffs' failure to warn claims were also dismissed. Under Louisiana law, whether pre- or post-LPLA, it is the obligation of the manufacturer to warn of defects in a product.

Judge Belsome, in a lone dissent, noted that under the LPLA the definition of "manufacturing" includes "designing" the product. Because it was undisputed that Dr. Kent designed the shape of a component of the implants, Judge Belsome argued that dismissal was improper and that Dr. Kent could be liable under the LPLA. Judge Belsome did not address the fact that, because plaintiffs' claims arose before the enactment of the LPLA, the Act's definition was inapplicable.

—*Wade B. Hammett*

OIL PLATFORM BARRICADE MAKER NOT LIABLE TO WORKER WHO FELL INTO UNGUARDED HOLE

***Boutin v. Newfield Exploration Co.*, No. 07-0567, 2009 WL 1530991 (W.D. La. 5/28/09)**

Brad Boutin was working on an oil platform as the lead operator primarily responsible for safety. While in the process of replacing a fog horn through a hole in the platform's main deck, Boutin removed the safety barricade over the hole, and fell through the hole, injuring his back. Boutin sued Roclan, the manufacturer of the safety barricade, under the Louisiana Products Liability Act ("LPLA"). Roclan and its insurer filed motions for summary judgment, contending that Boutin's injuries did not arise from a reasonably anticipated use of the safety barricade; therefore, they could not be liable under the LPLA.

In 2005, after a series of accidents occurred on offshore oil production platforms when workers fell through open holes and were injured, the Mineral Management Service ("MMS") issued a notice requiring platform operators to have a substantial barricade system in place. Boutin was working on a platform whose owner hired Roclan to manufacture open-hole barricades to comply with the MMS directive.

JONES WALKER

e*bulletin

PRODUCTS LIABILITY

July 2009 Vol. 101 productsliability@joneswalker.com

Under the Outer Continental Shelf Lands Act, the law of the state adjacent to the waters where the accident occurred (here Louisiana) applies to the extent it is not inconsistent with other federal laws and regulations. Under the LPLA, the plaintiff has a two-tiered burden of proof. First, the plaintiff must show his damages were proximately caused by a characteristic of the product that renders it unreasonably dangerous; second, that his damages arose from a reasonably anticipated use. In ruling on the motion, Judge Rebecca F. Doherty noted that if Boutin's damages did not arise from a reasonably anticipated use, there would be no need to consider whether the safety barricade was unreasonably dangerous.

Roclan argued that Boutin did not use the safety barricade at all; therefore, his injuries arose from a total non-use of the product. Boutin argued that he had used the safety barricade that day, but also admitted he had moved the barricade before he was injured. Judge Doherty found that even if Boutin had used the safety barricade that day, it was not being used when Boutin fell through the open hole on the platform. Importantly, Boutin moved the safety barricade before he fell through for reasons that had nothing to do with the design or construction of the barricade. Boutin moved the barricade simply because it was getting in the way of his access to tools and parts on the main deck. Judge Doherty concluded that failure to use the barricade for reasons unrelated to any alleged defect was not a reasonably anticipated use under the LPLA and therefore granted Roclan's summary judgment, dismissing Boutin's product liability claims.

—*Sarah S. Brehm*

FAMILY OF TRAILER FIRE VICTIM COULDN'T PROVE ASHTRAY CAUSED FIRE

***Lacoste v. Pilgrim International*, No. 07-2904, 2009 WL 1565940 (E.D. La. June 3 2009)**

Dwayne Lacoste died in a fire in his FEMA trailer in April 2006. Investigation revealed that a lit cigarette caused bedding materials within the trailer to ignite and that Lacoste consequently died of carbon monoxide smoke inhalation. His surviving family members brought suit against the FEMA trailer manufacturer, but later added allegations against Papermates, the manufacturer of an ashtray known as the Ash Eliminator.

The Lacoste family alleged that the Ash Eliminator was a cause of the fire, and was unreasonably dangerous in design, lacked adequate warnings, and failed to conform to an express warranty. The Lacostes argued that the Ash Eliminator was significantly taller than a normal ashtray, increasing the risk that a lit cigarette resting on the lip would fall and roll towards a flammable object.

Papermates filed a motion for summary judgment, arguing that there was a lack of evidence that the Ash Eliminator was inside the trailer at the time of the incident, that Lacoste was using the Ash Eliminator at the time of the incident, or that a cigarette fell out of the Ash Eliminator and started the fire. In short, Papermates contended that there was no evidence that the Ash Eliminator played any role in causing the fire.

JONES WALKER

e*bulletin

PRODUCTS LIABILITY

July 2009 Vol. 101 productsliability@joneswalker.com

Addressing the first point, Judge Sarah S. Vance observed that the State Fire Marshal inspected the trailer after the fire and found only a Coke can with several cigarette butts inside it. He found no Ash Eliminator. Members of the Lacoste family provided affidavits that they had entered the trailer before the fire marshal, removed the Ash Eliminator and delivered it to their attorney. While Judge Vance considered this removal of key evidence from the scene of the fire to be irregular, she agreed that the Lacostes had raised a genuine issue of fact as to whether the Ash Eliminator was at least present in the trailer at the time of the fire.

Judge Vance then examined the Lacostes' arguments concerning their theory that the Ash Eliminator caused the fire. The family stated that Lacoste's favorite brand of cigarettes were found in the bottom of the Ash Eliminator and that Lacoste was seen purchasing that brand of cigarettes the night before his death. They argued in their memorandum submitted by their attorney that, taken together, this evidenced Lacoste using the Ash Eliminator at some time shortly before his death. Judge Vance noted that the family had not substantiated these contentions with evidence. Though they claimed in the memorandum that Lacoste preferred a particular brand of cigarettes, their affidavits did not state which brand Lacoste preferred or which brand was found in the Ash Eliminator.

The family hypothesized that Lacoste placed a chair next to the sleeper sofa in the trailer and set the Ash Eliminator or a Coke can that he was using as an ashtray, or both, on the chair. Plaintiffs' expert stated that the fire might have been started in one of three ways, one being that a lit cigarette might have fallen from the ashtray and rolled between the chair and sofa bed where it could ignite. The Lacoste family argued that a cigarette from the Ash Eliminator had to have fallen and rolled between the chair and the sofa because, according to expert testimony, it would have smoldered out if it had been dropped on a flat surface such as the chair or sofa bed. However, Judge Vance noted that the expert had posited not simply one theory as to how the fire occurred, but three. The Lacoste family's choice of one out of three equally plausible scenarios was speculation, and not supported by their own expert's testimony. Accordingly, the family failed to demonstrate that there was a genuine issue as to a key element of their claim: that a defect in the Ash Eliminator was the most probable cause of the fire.

In an attempt to keep their case alive, the Lacoste family asked Judge Vance to reconsider a decision she had earlier made to dismiss their claim against the trailer manufacturer, Pilgrim. *See* MANUFACTURER OF FEMA TRAILER AND BEDDING MATERIAL DISMISSED IN FIRE DEATH CASE (February 2009). They contended they had discovered new evidence that the trailer was defective because it had only two smoke detectors instead of three, and that the smoke detectors were of the same type, rather than being different from one another. Judge Vance rejected this argument because there was no record evidence that the absence of a third detector was a cause of Lacoste's death or that the trailer deviated from Pilgrim's specifications. Judge Vance also repeated her rejection of the Lacoste family's argument that the trailer was defective due to lack of an escape hatch in the bathroom. Their expert's bare opinion that the bathroom could have been built with an escape hatch was insufficient to create a genuine issue of fact as to whether a specific alternative design existed at the time the trailer left Pilgrim's control. Accordingly, Judge Vance reaffirmed her earlier grant of summary judgment to Pilgrim.

JONES WALKER

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July 2009 Vol. 101 productsliability@joneswalker.com

A plaintiff who pursues a products liability claim must have more than mere theories as to how an accident occurred. A plaintiff must have concrete evidentiary support to defeat summary judgment.

—*Sarah B. Belter*

COURT FINDS MOST FORMALDEHYDE CLAIMS VERSUS MAKERS OF MOBILE HOMES ARE PREEMPTED

***In re FEMA Trailer Formaldehyde Products Liability Litigation*, No. MDL 07-1873, 2009 WL 1546080 (E.D. La. May 29, 2009)**

FEMA provided emergency housing units ("EHUs") to individuals whose homes were destroyed by Hurricanes Katrina and Rita. Plaintiffs, individuals residing in the EHUs, asserted claims that the EHUs were constructed with products that included formaldehyde and, as a result, the plaintiffs were exposed to unsafe levels of formaldehyde. Plaintiffs also claimed that the warnings included in the EHUs were inadequate to alert them to the potential for dangerous exposures. Numerous actions were filed against the manufacturers of the EHUs, the United States Government, and some government contractors who delivered and installed the EHUs. These actions were transferred to the Eastern District of Louisiana for pre-trial coordination before Judge Kurt D. Engelhardt.

EHUs consist of mobile homes, travel trailers, and park models. The defendants who manufactured mobile homes moved to dismiss, contending that the construction of mobile homes (unlike trailers and park models) is governed by federal law, specifically the Manufactured Home Construction and Safety Standards Act ("MHA") and related regulations set by the United States Department of Housing and Urban Development ("HUD Code"). The manufactured home defendants asserted that plaintiffs' claims were explicitly and impliedly preempted by the MHA and the HUD Code. Judge Engelhardt agreed with the manufactured home defendants that the plaintiffs' claims against them were preempted.

The MHA and the HUD Code specifically provide that no state shall have the authority to establish or continue in effect any standard regarding construction or safety which is not identical to the MHA's construction and safety standards. The MHA states that this provision shall be broadly and liberally construed so to ensure the uniformity of the comprehensive standards promulgated by the MHA. The MHA also sets forth that state courts have jurisdiction under state law over construction or safety issues where no federal manufactured home construction and safety standard has been established. Additionally, HUD specifically states its intention that the federal formaldehyde standards preempt any state and local formaldehyde standard.

Judge Engelhardt noted that the MHA contains a "savings clause", which specifically states that "compliance with the construction or safety standards does not exempt any person from liability under common law." However, Judge Engelhardt found that the "savings clause" did not save plaintiffs' state law claims with respect to the standards at issue.

JONES WALKER

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PRODUCTS LIABILITY

July 2009 Vol. 101 productsliability@joneswalker.com

Judge Engelhardt noted that the HUD Code has both general standards, requiring conformance with "accepted engineering practices" as well as specific standards, here standards for formaldehyde emissions from materials used in manufactured homes. In those specific formaldehyde standards, HUD adopted a product standard, identifying maximum formaldehyde emissions for those formaldehyde containing products used in a manufactured home, plywood and particleboard. Additionally, the HUD Code required a health notice be temporarily displayed in the kitchen of each manufactured home and specified the language to be used in the notice, including the types of symptoms that are associated with formaldehyde and factors that impact formaldehyde emissions. Judge Engelhardt reviewed the legislative history associated with the HUD Code and found that HUD specifically considered *but rejected* an ambient air standard to establish the maximum emission standard for formaldehyde, finding the product standard to be the more effective standard, including ease of testing and enforcement.

The MHA does not explicitly preempt state law claims. And, as to implied preemption, Judge Engelhardt found that the savings clause was evidence that Congress did not intend to occupy the field. However, Judge Engelhardt found that the preemption clause regarding product standards, the savings clause and the jurisdiction clause of the MHA "all can, indeed, be properly reconciled, when read and analyzed consistently with the rest of the MHA." Judge Engelhardt concluded: "The MHA clearly states that if states want to regulate safety matters that federal law *already covers* (like formaldehyde emissions), those regulations must be 'identical.'" Judge Engelhardt found that "it was neither Congress' nor HUD's intention to allow states to affect the manufacturing of mobile homes so drastically by setting standards through their courts that would be totally different from the federal standards." Thus, he concluded that federal law preempted plaintiffs' state law products liability claims alleging an excessive level of formaldehyde in the air of the mobile home. Judge Engelhardt reasoned that allowing the plaintiffs to enforce an ambient air standard "would essentially require each mobile home manufacturer to tailor its industry, state-by-state, in an attempt to comply with the peculiarities of each state's law as then interpreted by each particular state's judiciary."

Judge Engelhardt also reasoned that preemption applies where the state common law sought to be enforced stands as an obstacle to the accomplishment and execution of the important identified federal objectives. Judge Engelhardt stated that "the ambient air standard (even though it was considered and rejected by HUD, which instead adopted the product standard) would serve as an obstacle to the MHA's objectives of achieving a balance between uniformity, safety and affordability." He concluded, "[T]his court determines that Plaintiffs' state law claims *do* directly conflict with the federal regulations promulgated under the MHA, as they seek to enforce an entirely different standard for measuring the legally permissible amounts of formaldehyde in mobile homes." As such, plaintiffs' state law claims alleging that defendants should have adhered to a standard different from the federal formaldehyde standards were preempted.

Judge Engelhardt also concluded that the plaintiffs' inadequate warnings claims were preempted. He reasoned that the warnings defined by HUD are based upon a consideration by that federal regulatory authority as part of the federal construction and safety standards. A state law failure to warn/inadequate warnings claim such as the one advanced by plaintiffs would require more than the HUD regulations do, standing as an obstacle to the MHA and the HUD Code.

Judge Engelhardt noted that plaintiffs' state law claims, to the extent they alleged "non-compliance" with the federal formaldehyde regulations, were not preempted. Likewise, failure to warn claims alleging violations of the federal warning requirements were not preempted.

—*Amy M. Winters*

JONES WALKER

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PRODUCTS LIABILITY

July 2009 Vol. 101 productsliability@joneswalker.com

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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